NO. 75-1500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND PROFESSIONAL LIFE AND CASUALTY COMPANY,

Petitioners,

v.

ANN ARBOR TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioners, North American Company for Life and Health Insurance, Provident Life and Accident Insurance Company, Professional Life and Casualty Company, and Massachusetts Mutual Life Insurance Company, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit, rendered in these proceedings on December 8, 1975, insofar as such order remanded the cases with instructions to the United States District Court for the Eastern District of Michigan to retain these cases on its docket pending final disposition by the Supreme Court of Michigan of certain cases then pending in a State trial court. Further, the petitioners respectfully submit that a summary reversal of said order, insofar as it remands these cases

to said District Court with instructions, would be appropriate.

OPINIONS BELOW

Sixth Circuit. The judgment of the court below in this case (Appendix A, infra, p. 1a) is reported at 527 F.2d 526.

The order of the Court below denying respondent's motion to abstain (Appendix B, infra, p. 5a) was not reported.

The order of the court below denying the petitioners' petitions for rehearing (Appendix C, infra, p. 5a) was not reported.

District Court. The opinion and order of the District Court rendered in the case entitled *Ann Arbor Trust Company* v *North American Company for Life and Health Insurance*, granting summary judgment in favor of North American Company for Life and Accident Insurance, (Appendix D, infra, p. 6a) is reported at 383 F. Supp 310. The orders of judgment in the separate cases brought by respondent against North American Company for Life and Health Insurance, Provident Life and Accident Insurance Company, Massachusetts Mutual Life Insurance Company, and Professional Life and Casualty Company (Appendix E, infra, p. 16a) were not separately reported.

The opinion and order of the District Court denying respondent's motion to alter and amend judgment, to grant relief to plaintiff from judgment and, in the alternative, for leave to file supporting affidavits, in the case brought against North American Company for Life and Health Insurance (Appendix F, infra, p. 20a) was not reported. The orders denying identical motions in the other three cases (Appendix G, infra, p. 24a) were not reported.

JURISDICTION

The judgment of the Court below (Appendix A, infra, p. 1a) was entered on December 8, 1975. Petitioners' timely petitions for rehearing were denied on January 19, 1976 (Appendix C, infra, p. 5a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The district court acting pursuant to its diversity jurisdiction, ruled that, under applicable Michigan law, the beneficiary under various life insurance and accidental death insurance policies containing "suicide, whether sane or insane" exclusions was barred from recovering benefits under said insurance policies when the insured undisputedly died from a self inflicted gun shot wound and, therefore, that the insurance carriers were entitled to summary judgments. The court of appeals affirmed the district court's ruling and specifically ruled that abstention was not appropriate in the insant case, but nonetheless proceeded, *sua sponte*, to remand the cases with instructions to the district court to retain the cases on its docket pending a final decision by the Michigan Supreme Court in any one of five separate cases now pending in a state trial court. The question presented is:

Whether, after affirming a District Court's finding that the petitioners were entitled to summary judgments and specifically holding that the case presented was not an appropriate one for abstention by it, a U.S. Court of Appeals abused its discretion, and, in effect, wrongfully abdicated its jurisdiction, by (1) directing the U.S. District Court to hold the cases on its docket for an indefinite time pending a possible final disposition, by the highest court

in a state, of separate cases then pending in a state trial court, and (2) further directing the U.S. District Court, upon a contrary decision being subsequently rendered by such highest state court, to reopen the within cases and make a new determination therein consistent with the state court decision?

STATEMENT OF THE CASE

At or about 8:00 a.m. on November 5, 1971, within a period of approximately one minute, Dr. Alexander P. Dukay, a prominent psychiatrist residing in Ann Arbor, Michigan, fatally shot his twelve year old daughter twice in the back of the head, mortally wounded his wife by shooting her at least 5 times, reloaded his pistol, and shot himself in the head, dying almost instantaneously.

At the time of his suicide, Dr. Dukay was insured under policies of life insurance and accidental death insurance with at least nine different insurance carriers. The respondent, as Trustee of a life insurance trust, was named as beneficiary under such policies.

In October, 1973, respondent instituted separate lawsuits against the nine insurance carriers in the Circuit Court for the County of Washtenaw, State of Michigan, claiming entitlement to benefits under the respective insurance policies. Each of the four cases brought against the petitioners was timely removed to the United States District Court for the Eastern District of Michigan pursuant to the provisions of 28 USC §1441, the jurisdiction of said court being based upon diversity of citizenship and amount in controversy. The other five cases remained pending in state court.

Upon completion of limited discovery, each of the petitioners moved for summary judgment. The District Court, finding that the fact that Dr. Dukay died from a self-inflicted gunshot wound was uncontroverted, ruled that the respondent was barred from recovering benefits under the "suicide, whether sane or insane" exclusion contained in each of the policies. Accordingly, the court entered summary judgments in favor of each of the petitioners.

The respondent appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit. By stipulation of the parties, the cases were consolidated on appeal.

The court below affirmed the District Court's decision and further rejected the respondent's contention that that court should abstain from rendering a decision until final disposition of the state court cases. Despite the foregoing, however, the Court of Appeals went on to remand the case with instructions, stating:

> "Therefore, we affirm the judgment of the District Court, but remand this action to that court with instructions that it be retained on the docket of the District Court pending final disposition of the five cases now pending in the State courts. If the Supreme Court of Michigan should render a decision in one of those five cases contrary to the conclusion we have reached, the District Court shall reopen the case and make a determination consistent with the decision of the Supreme Court of Michigan with respect to the interpretation and effect to be given the suicide provisions of the insurance policies in question."

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With Applicable Decisions Of This Court.

This Court, on numerous occasions, has held that extraordinary circumstances must exist before a federal court is justified in staying proceedings properly before it pending the outcome of other cases. In *Landis* v *North American Co.*, 299 U.S. 248, 255 (1936) the Court noted that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both."

In correctly deciding that abstention was not proper in the instant cases, the court below recognized that the case did not present any rare or extraordinary circumstances. The only ground stated by the court in support of its remand order was its uncertainty as to the interpretation which the Supreme Court of Michigan might, in the future, place upon its earlier decisions, which decisions were expressly recognized by the court below as controlling, and supportive of, the District Court's decision. (See Appendix A, *infra*, p. 2a)

This Court has steadily held that uncertainty of state law is not, alone, a sufficient basis for staying a federal court action; and that a federal court has no authority to turn an issue over for determination to a state court when the federal court has properly acquired jurisdiction and the issue has been presented to it for decision. *Meredith* v *City of Winterhaven*, 320 U.S. 228 (1943); *McClellan* v *Carland*, 217 U.S. 268 (1910); *Chicot County* v *Sherwood*, 148 U.S. 529 (1892). Such rule must clearly apply where, as here, the only uncertainty is in the realm of pure speculation concerning a subsequent change in existing law.

By its remand order, the court below has effectively abdicated to a state court its authority and responsibility, as a federal court, to decide the substantive issue properly presented to it below. This is in direct conflict with the above-described principles steadily adhered to and enunciated by this Court. As was held in *McClellan* v *Carland*, *supra*, at page 282:

> "The rule is well recognized that the pendency of an action in the State Court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. *In the present case, so far as the record before the circuit court of appeals discloses, the circuit court of the United States had acquired jurisdiction, the issues were made up, and when the state intervened, the Federal court practically turned the case over for determination to the State Court. We think it had no authority to do this,* and that the circuit court of appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the circuit court of the United States to show cause why he did not proceed to hear and determine the case." [Emphasis Supplied]

The above rule has been applied in cases where there existed an identity of parties, as well as issues, in the state and federal court proceedings. When, as here, such identity does not exist, the rule would appear to have even greater application.

Furthermore, the remand instructions of the court below,

in effect a stay of indefinite duration, are in direct conflict with this Court's holding in the *Landis* case that a stay, even when justified by extraordinary circumstances, must not exceed the bounds of moderation.

In *Landis* this Court expressly held that the limits of fair discretion were exceeded when it was likely that *two* or more years might elapse between the commencement of proceedings and a final determination by the Supreme Court. In the instant case the time elapsed since commencement of suit (2½ years) has already exceeded the duration denounced by this Court as unreasonable in *Landis*. Petitioners are informed and believe that none of the five state court cases have yet proceeded to trial. Thus, the myriad of possible legal and factual determinations which may result at either the trial or appellate court level render it likely that many more years will elapse before the Supreme Court of Michigan might, if ever, consider the issue of state law presented below. Petitioners submit that the order below exceeds the limits of fair discretion and that this Court should not permit such abuse to go without correction.

2. The Decision Below Constitutes A Substantial Departure From The Accepted And Usual Course of Judicial Proceedings And Impedes The Effiicient Administration of Justice.

Not only does the decision below directly conflict with the principles of judicial proceedings established by this Court, as set forth *supra*, it departs from the fundamental policy favoring finality of judgment. The rationale underlying such policy was set forth by Mr. Justice Harlan in *Southern Pacific R.R.* v *United States*, 168 U.S. 1, 49, 18 S. Ct. 18, 42 L. Ed 355 (1897).

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for *the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them.*" [Emphasis Supplied]

In accordance with such policy, the petitioners were and are entitled to have the instant cases concluded by the entry of an unqualified final judgment in their favor. The Courts below had properly assumed diversity jurisdiction of the cases, the issues were properly presented and both of the lower courts actually determined that the petitioners were entitled to judgment on the basis of state law, applied in accordance with the mandate of *Erie R.R. Co.* v *Tompkins*, 304 U.S. 64 (1938) and its progeny. The further decree by the court below that the judgments granted below must be retroactively voided should there be a subsequent change in state law simply fails to comport with the accepted and usual course of judicial proceedings.

Implicit in the decision below is the presumption that the state court cases involve issues identical to the issues presented below. The record in the instant case simply does not support such a presumption. In addition, the court below expressly presumed that one or more of the state court cases will find its way to the state appellate courts. There simply is no support for such a presumption anywhere in the record below or in common judicial ex-

perience. Petitioners submit that reliance by the court below upon such improper and totally unsupported presumptions constitutes a further departure from accepted and acceptable judicial practice.

One obvious effect which such decree has upon the efficient administration of justice is that it encourages the respondent to appeal the cases pending in state court by offering respondent the possibility of a second day in court in connection with the instant cases. Such encouragement surely impedes the efficient administration of justice in both the state and federal courts.

In summary, the order below denies petitioners the fundamental right to which every litigant in federal court is entitled—"the just, speedy, and inexpensive determination of every action." Rule 1, Federal Rules of Civil Procedure. Such a denial should not be countenanced by this Court.

For the foregoing reasons, petitioners respectfully request that the Court grant their petition for a writ of certiorari and summarily reverse the remand portion of the decision below.

Respectfully submitted,

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APPENDIX A

No. 75-1217
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN ARBOR TRUST CO.,
Plaintiff-Appellant,
v.
NORTH AMERICAN CO. FOR LIFE & HEALTH INSURANCE, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed December 8, 1975.

Before: PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

PHILLIPS, Chief Judge. This appeal involves the suicide provisions of four life insurance policies. Jurisdiction is based on diversity of citizenship. Michigan law controls.

On November 5, 1971, Alexander P. Dukay, a practicing psychiatrist, shot and killed his daughter and his wife, and then reloaded the revolver and killed himself in the kitchen of their home in Ann Arbor, Michigan. Within two years prior to his death, Dr. Dukay purchased nine insurance policies, all of which contained provisions to the effect that if the insured should commit suicide while sane or insane within two years from the date of issue, the only liability of the insurance companies would be to return the premiums paid.

Nine suits were filed in Michigan State courts. Four of these cases were transferred to the United States District

Court. The District Court granted summary judgment in favor of the insurance companies. The trust company, beneficiary under the policies, appeals. For a more detailed recitation of facts, reference is made to the decision of Chief District Judge Fred W. Kaess in the action against North American Company, reported at 383 F. Supp. 311 (E.D. Mich. 1974).

The other five cases, involving the same questions of law, remain pending in Michigan trial courts.

The District Court held that the actions of the insured constituted "suicide, sane or insane" within the meaning of the exclusionary provisions of the North American Insurance policy, whether or not the insured had the capacity to comprehend the physical nature of consequences of his act.

We conclude that this decision is supported by the rationale of the following controlling opinions of the Supreme Court of Michigan: *Courtemanche* v. *Supreme Court, Independent Order of Foresters,* 136 Mich. 30, 98 N.W. 749 (1904); *Sabin* v. *Senate of the National Union,* 90 Mich. 177, 51 N.W. 202 (1892); *Blackstone* v. *Standard Life & Accident Ins. Co.,* 74 Mich. 592, 42 N.W. 156 (1889); *Streeter* v. *Western Union Mutual Life & Accident Society of the U.S.,* 65 Mich. 199, 31 N.W. 779 (1887); and *John Hancock Mutual Life Ins. Co.* v. *Moore,* 34 Mich. 41 (1876).

It is recognized, however, that the law in this area is not settled. *See* Annotation, 9 A.L.R.3d 1015 (1966). This court cannot be certain what interpretation the Supreme Court of Michigan would place upon its five earlier decisions cited above, the latest of which was announced in 1904. Under *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), it is our obligation to make a considered "educated guess" as

to what decision would be reached by the Supreme Court of Michigan with respect to the policies involved in this litigation under the facts of the present case.

Presumably one or more of the five suits now pending in Michigan trial courts will find its way to the appellate courts of that State. If the Supreme Court of Michigan should reach a decision contrary to the judgment of Judge Kaess and the conclusion we have expressed in this opinion, the decision of that court would be controlling and our decision would be erroneous.

In spite of the uncertainty of State law on this subject, this is not an appropriate case for abstention by this court. In *Krakoff* v. *United States,* 431 F.2d 847, 848 (6th Cir. 1970) this court said: "Abstention is not ordinarily granted in cases involving only common law questions which a federal court, under its diversity jurisdiction, is bound to decide."

Therefore, we affirm the judgment of the District Court, but remand this action to that court with instructions that it be retained on the docket of the District Court pending final disposition of the five cases now pending in the State courts. If the Supreme Court of Michigan should render a decision in one of those five cases contrary to the conclusion we have reached, the District Court shall reopen the case and make a determination consistent with the decision of the Supreme Court of Michigan with respect to the interpretation and effect to be given the suicide provisions of the insurance policies in question.

Two children of Dr. and Mrs. Dukay survive this tragedy. The appellant, Ann Arbor Trust Co., is beneficiary under the insurance policies for the use and benefit of these two children. The disposition we make on this appeal will protect the rights of these two children in the event the Su-

preme Court of Michigan should decide against the insurance companies on the issues presented here.

Affirmed and remanded with instructions. The costs of this appeal are assessed against appellant.

APPENDIX B

NO. 75-1217
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN ARBOR TRUST COMPANY,
a Michigan corporation
Plaintiff-Appellant

v.

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,
a foreign corporation, et al.
Defendants-Appellees

ORDER
Filed
June 5,
1975

Plaintiff-appellant has filed a motion in this court for abstention. These proceedings began in the state courts of Michigan and reached the United States District Court for the Eastern District of Michigan by removal at the instance of the defendants. The basis of jurisdiction is diversity of citizenship. The plaintiff-appellant seeks the abstention of this court on the ground that there are five related cases pending in a state court in Michigan the decision in which might contain a pronouncement of controlling state law.

Upon consideration of the motion the court concludes that it is not well taken. Federal courts are required to decide common law questions presented to them under their diversity jurisdiction. When this case has been assigned to

a panel of this court for argument and decision, that panel may consider the question of whether this court should abstain from deciding an issue of state law. *Krakoff* v. *United States*, 431 F.2d 847 (6th Cir. 1970).

The motion to abstain is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

APPENDIX C

No. 75-1217
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN ARBOR TRUST COMPANY,
Plaintiff-Appellant,

v.

NORTH AMERICAN CO. FOR LIFE & HEALTH INSURANCE, ET AL.,
Defendants-Appellees.

ORDER
DENYING
PETITION
TO REHEAR
Filed
January 19,
1976

Before PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing filed by North American Company for Life and Health Insurance, Massachusetts Mutual Life Insurance Company and Provident Life and Accident Insurance Company, and the petition for partial rehearing filed by Professional Life and Casualty Company, be and hereby are denied.

Entered by order of the court.

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY,
a Michigan corporation,
Plaintiff

v.

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,
a foreign corporation,
Defendant

CIVIL ACTION NO. 74-70649
Filed September 30, 1974

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The undisputed facts upon which this action is founded, stated very briefly, are as follows:

> On November 5, 1971, Alexander P. Dukay, a practicing psychiatrist in the City of Ann Arbor, Michigan, and formerly the superintendent of Ypsilanti State Hospital, shot his daughter (twice), his wife (at least five times), and himself within a period of less than one minute in the kitchen of their home at approximately eight o'clock in the morning. At the time of his death, Dr. Dukay was insured under defendant's policy of life insurance in the amount of $100,000.00. This policy provides that "if the insured commits suicide while sane or insane within two years from the date of issue," the company's only obligation is to return the premiums paid. Dr. Dukay died within two years of the issuance of the policy.

That Dukay's death was a result of a self-killing is not denied by plaintiff, however, it is plaintiff's position that under the law of Michigan if the mental condition of Dr. Dukay immediately preceding his death was such that his act of self-killing was either involuntary or if at such time he did not understand the physical consequences of his act, the "suicide, sane or insane" exclusion of the policy is not applicable and the full face amount of the policy is due. Plaintiff further contends that under Michigan law a self-killing under such circumstances is not defined as suicide.

Plaintiff states that it intends to offer at trial expert psychiatric testimony in proof of the state of mind of Dr. Dukay as it existed immediately prior to his death.

In 9 ALR 3d, there appears at page 1015 et seq. an annotation dealing directly with the construction of the "sane or insane" provision of suicide exclusion clauses contained in insurance policies. The overview provided by that annotation is helpful in narrowing the legal issues to be considered by the Court in this matter. In the annotation at page 1017, the following was stated by way of summary as to the current state of the law:

> "Provisions excluding or limiting the insurer's liability where injury or death results from suicide have usually been held valid, absent a regulatory statute providing otherwise. Numerous early cases held that self-destruction while insane was not suicide within the provision against death by suicide, since it was deemed that there could be no suicide unless the person committing the self-destructive act could form a conscious intention to kill himself and carry out that act, realizing its moral and physi-

cal conditions and consequences. As a reaction to these holdings, insurers began to add to the simple suicide exclusion the words 'sane or insane' and it is with the effect of these additional words that this annotation is concerned.

"In construing the suicide exclusion as modified by the term 'sane or insane' (or equivalent language), the courts have reached substantial agreement that liability for a merely accidental death is not excluded, even though the destructive act was, in a sense, that of the insured, as where he accidentally shot himself. On the other hand, the position has generally been taken that even though the term 'suicide' is used in the exclusion, the addition of the words 'sane or insane' does away with any necessity that the insured have had comprehension of the moral or legal nature and consequences of the destructive act. It also seems to be well settled that death from a self-destructive act falls within the exclusion of death from 'suicide, sane or insane', although the act was the result of an irresistable impulse and therefore not intended or mentally consented to by the insured.

"The courts have reached widely opposed results, however, in passing upon the question whether 'suicide, sane or insane' can be found where the insured, at the time he destroyed himself, was so insane as not to be able to appreciate or comprehend the physical nature and consequences of the destructive act. Several courts have held that the lack of such comprehension is immaterial, and that recovery is barred if the act committed was of such a character that if performed by a sane person, it would have been

regarded as suicidal. Other courts have held that if the insanity was such that the insured did not comprehend that the act performed would be injurious or fatal, or did not intend the fatal consequence of the act because of his insanity, the act could not be characterized as 'suicide' for the purposes of the exclusion clause."

It can thus be said that a "suicide, sane or insane" exclusionary clause clearly does not cover a case of accidental death in the ordinary sense. Michigan law is in accord with this position.[1] In the instant case, however, there appears to be no claim of accidental death. Moreover, the undisputed facts clearly belie such a contention and plaintiff has submitted nothing in the way of a factual assertion that the fatal head wound was accidental, as the term is commonly understood.

Plaintiff herein, however, appears to hang its hopes upon another exception to the suicide exclusionary clause, namely, that the insured was so deranged as to be unable to comprehend the physical nature and consequences of his destructive act. Simply put, it is plaintiff's argument, and in the opinion of the Court, the only argument legally available to plaintiff, that the insured failed to realize that shooting himself through the head would most likely result in death.

Plaintiff, however, must overcome two obstacles to survive defendant's motion for summary judgment. It must be first established that there is a genuine issue or disagreement, and secondly, that the disagreement concerns a material fact.

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[1] *Blackstone* v. *Insurance Co.*, 74 Mich, 592 (1889); *Courtemanche* v. *Supreme Court*, I.O.F., 136 Mich. 30 (1904).

The second obstacle is a legal one, for it will be established that the dispute concerns a material fact only if the Court finds that the proffered defense is available under Michigan law. Of the Michigan cases dealing with suicide exclusion clauses, the most recent was decided in 1904. More importantly, none of the cases has directly decided if the insured's failure to comprehend the physical consequences of his act will allow recovery under an insurance policy containing a "suicide, sane or insane" clause. Dicta in two cases militates in favor of recovery under such circumstances, *Streeter* v. *Insurance Society*, 65 Mich. 199 (1887); *Sabin* v. *National Union*, 90 Mich. 177 (1892). Dicta in another case, however, indicates that recovery would not be allowed, *Blackstone* v. *Insurance Co.*, 74 Mich. 592 (1889). In *Streeter*, the court said that if one does an act in a state of unconsciousness, or involuntarily, whether he is sane or insane, such act is nothing more or less than accidental, and will not operate to forfeit the policy. In that case, however, the court said there was no evidence that the act was involuntary, or that the insured was unconscious when he inflicted upon himself the fatal wound.

In *Sabin*, the court seems to have assumed that in a proper case unconsciousness of the physical consequences of the act, or lack of intention to kill oneself, would prevent the application of the provision, although a directed verdict for the insurer was affirmed, apparently on the ground that the fact that the insured hanged himself showed that he was not unconscious of the physical consequences of the act and no evidence to the contrary was offered.

In *Blackstone*, the Court considered a simple suicide

exclusionary clause, that is, one not modified by the words "while sane or insane." While the language therein was construed in a manner favorable to the insured, the Court, in an effort to lessen the impact on insurers, went on to explain its holding:

> "Nor can it have any injurious effect, since insurers may always frame such contracts to suit themselves, and may, if they choose, insert express stipulations to the effect that insanity shall not in any case prevent an avoidance by the suicide of the insured.
>
> • • •
>
> "Policies issued by some life insurance companies contain a condition or provision that it shall be void if the insured shall die by suicide, felonious or otherwise, sane or insane; others provide, if the insured shall die by suicide, sane or insane; others provide for an avoidance, if the insured die by his own hand, sane or insane; while others provide for an avoidance if he shall die by his own act and intention, sane or insane. Such a condition, expressed in any of these forms, covers any case of voluntary self-destruction, and no kind or degree of insanity will prevent an avoidance; and the courts, not only in England, but in this country, have almost universally held that with such provisions in policies of life insurance the policies are void if the insured comes to his death by his own hand." *74 Mich. 610, 611.*

Although the cited cases are of assistance, this Court is nevertheless confronted with an issue novel to Michigan jurisprudence. After considering the plain and ordinary

meaning of the contractual language, the probable intent and contemplation of the parties, and the trend of the law on this issue, the Court is constrained to reject plaintiff's position. Frankly, it is an argument that is so sublime as to approach the ridiculous. Where but among lawyers could it be contended and argued that a man who in the period of one minute shot and killed his wife and daughter, reloaded his revolver, placed the barrel in his mouth and then pulled the trigger, had not committed suicide. Surely it was just such a scenario toward which the contractual language was directed and the risk of which the insurer sought quite legitimately to avoid. It is, therefore, the Court's feeling that the better rule is that which holds that the insurer need not prove that the insured had the capacity to comprehend the physical nature or consequences of his act in order to avoid liability. Ample authority for this proposition can be found at 9 ALR 3d 1015 and in the decision of *Johnson* v. *Metropolitan Life Ins. Co.*, 273 F. Supp. 589 (D.C. N.J. 1967); affirmed 404 F 2d 1202 (CA 3, 1968), wherein it was said:

> "This Court would follow the sound majority rule that applicability of a 'suicide, sane or insane' clause is not dependent on the insured's clear realization of the physical nature and consequences of his acts, for the reasons well stated in the most recent discussion of the rule in *Aetna Life Ins. Co.* v. *McLaughlin*, 380 S.W. 2d 101, 9 A. L.R. 3d 1005 (Tex.) (1964); see also Couch, 9 Insurance 2d, Sect. 40.42 (1962)."

Even if it is assumed that the insured's comprehension of the physical nature of his act was material to the disposition of plaintiff's claim, there has been a failure to

raise a genuine issue as to such fact. Defendants have set forth undisputed, and in most cases admitted, facts. It is also clear that the facts as set forth can readily support a finding or conclusion that the insured understood the physical nature of consequences of his act, in the absence of evidence to the contrary. *Streeter and Sabin*, supra. In *Sabin* the Court stated:

> "Upon the question whether the person taking his life by his own hand was conscious of the natural result of the act which caused death, the facts of the Streeter case having a similar, if not the identical, bearing, as do the facts in the case before us. In that case Mower shot himself with a pistol, while here the plaintiff's intestate hung himself. There would be as much if not more deliberation in the act, and consciousness of the physical result, in this case as in the other. If, as was said in *Bigelow* v. *Insurance Co.*, 93 U.S. 284, 'Bigelow (or Mower in the Streeter case) knew he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose,' then in this case Sabin knew he was taking his own life, and showed sufficient intelligence to employ a rope, and adjust it to hang himself, and accomplished his death, and had 'capacity' enough to understand the physical nature and consequences of his act. In the Streeter case the fact that the suicide had capacity enough left to know the physical consequences of his act, although he did not appreciate its moral character, and was unconscious of the crime he was committing, was deduced entirely from the method employed in taking his life, * * *." 90 Mich. at 180.

Likewise in Johnson, the Court in deciding a motion for summary judgment stated:

> "In the present case, however, even assuming, without deciding, that comprehension of the fatal character of his action was required, plaintiffs have offered no allegation, let alone specific factual contentions which could support a reasonable conclusion that the decedent was unaware of the fatal consequences of his acts; indeed, such a contention would beggar credibility in light of the stipulated circumstances of his death. * * * This situation is similar to that in *Clarke* v. *Equitable Life Assurance Society*, 118 F. 374 at page 378 (4th Cir. 1902) where the Court said:
>
> 'The contention of the appellant is that self-destruction avoids the policy if the insured lacked intelligence to know that his act was wrong, but that it is not avoided if he did not understand the physical nature of his act. To sustain such contention would require us to believe that the deceased shot himself through the head because he did not know that it would kill him.' " 273 F. Supp. at 593-594.

Plaintiff has responded to the facts as set forth and to the conclusion that can be drawn therefrom with the mere assertion that some unspecified proof, presumably to the contrary, will be forthcoming at trial. It is settled that in motions for summary judgment, the responding party must set forth its facts in the form of affidavits, depositions, exhibits and the like. It is only in this way that a "genuine issue" is created, and a respondent cannot succeed by asserting that proof will be forthcoming at trial or by relying upon unsupported allegations or claims in the pleadings.

Federal Rules of Civil Procedure 56(e) provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

See *Johnson* v. *Metropolitan Life Ins. Co.*, 404 F 2d 1202 (CA 3, 1968), for the application of the above principle in circumstances nearly identical to the instant case. See generally, *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F 2d 635 (CA 1969); *Garcia* v. *American Marine Corp.*, 432 F 2d 6 (CA 1970); *De Mert & Dougherty, Inc.* v. *Chesebrough-Pond's Inc.*, 348 F. Supp. 1194 (D.C. Ill, 1972); *Franks* v. *Thompson*, 59 F.R.D. 142 (D.C. Ala. 1973).

For the foregoing reasons, IT IS ORDERED that defendant's motion for summary judgment be GRANTED.

/s/ FRED W. KAESS
Chief United States
District Judge

DATED: September 30, 1974

APPENDIX E

ANN ARBOR TRUST COMPANY, a Michigan corporation,

Plaintiff,

-vs-

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, a foreign corporation,

Defendant.

CIVIL ACTION NO. 4-70649

ORDER OF JUDGMENT

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 30th day of September, 1974;

Present: THE HONORABLE FRED W. KAESS
Chief United States District Judge

For the reasons stated by the Court in its Opinion and Order of September 30, 1974, in Civil Action No. 74-70649, IT IS ORDERED that summary judgment be, and hereby is, entered on behalf of defendant.

/s/ FRED W. KAESS
Chief United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY, a Michigan corporation,

Plaintiff,

-vs-

MASSACHUSETTS MUTUAL LIFE INS. CO., a Massachusetts corporation,

Defendant.

CIVIL ACTION NO. 4-70650

ORDER OF JUDGMENT

At a session of said Court, held in the City of Detroit, Wayne County, Michigan, in the Federal Building, this 30th day of September, 1974;

PRESENT: THE HONORABLE FRED W. KAESS
Chief United States District Judge

For the reasons stated by the Court in its Opinion and Order of September 30, 1974, in Civil Action No. 74-70649, IT IS ORDERED that summary judgment be, and hereby is, entered on behalf of defendant.

/s/ FRED W. KAESS
Chief United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY, a Michigan corporation, Plaintiff, -vs- PROVIDENT LIFE AND ACCIDENT INSURANCE CO., Defendant.	CIVIL ACTION NO. 4-70651

ORDER OF JUDGMENT

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 30th day of September, 1974;

Present: THE HONORABLE FRED W. KAESS
Chief United States District Judge

For the reasons stated by the Court in its Opinion and Order of September 30, 1974, in Civil Action No. 74-70649, IT IS ORDERED that summary judgment be, and hereby is, entered on behalf of defendant.

/s/ FRED W. KAESS
Chief United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY, a Michigan corporation, Plaintiff, v. PROFESSIONAL LIFE & CASUALTY COMPANY, a foreign corporation, Defendant.	CIVIL ACTION NO. 74-70660

ORDER OF JUDGMENT

At a session of said Court held in the Federal Building, City of Detroit, County of Wayne, Michigan, on the 30th day of September, 1974.

PRESENT: Honorable Fred W. Kaess
Chief United States District Judge

For the reasons stated by the Court in its Opinion and Order of September 30th, 1974, in Case No. 74-70649,

IT IS ORDERED that summary judgment be and hereby is entered on behalf of defendant.

/s/ FRED W. KAESS
Chief United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

ANN ARBOR TRUST COMPANY, a Michigan corporation,

Plaintiff,

-vs-

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, a foreign corporation,

Defendant.

CIVIL ACTION NO. 74-70649

OPINION AND ORDER DENYING PLAINTIFF'S "MOTION TO ALTER OR AMEND JUDGMENT, ETC."

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 6th day of November, 1974;

Present: THE HONORABLE FRED W. KAESS
Chief United States District Judge

Plaintiff has filed a "Motion to Alter or Amend Judgment" and sets forth numerous grounds in support thereof. The motion is in effect one for rehearing and is therefore decided without argument or answering brief.

Defendant's burden at the time of its Motion for Summary Judgment was to establish that there was no genuine issue or dispute as to a material fact. Plaintiff contends that there is a genuine dispute as to the insured's state of mind at the time he took his own life. This Court is of the opinion, however, that the deceased's state of mind, that is, his ability to comprehend the physical consequences

of his act, is not a material or relevant issue under the law of Michigan. This precise issue is novel to Michigan jurisprudence and in deciding the question this Court has been well aware of the elementary principle that it should use its best efforts to determine how the highest court of the State would decide the issue. The Court has thus chosen the path which it feels the courts of Michigan would choose to follow. As a consequence this legal decision, the alleged dispute of fact is not material, but rather immaterial.

As a second basis for its decision, the Court feels there is no genuine issue or dispute, in a legal sense, as to the insured's ability to comprehend the physical consequences of his act, notwithstanding plaintiff's contention. Rule 56(c) and (e) of the Federal Rules of Civil Procedure provides in part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

• • •

"The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does

not so respond, summary judgment, if appropriate, shall be entered against him."

Defendant filed no affidavits in support of its motion and it is not incumbent upon it to do so. There is extant, however, a record more than adequate to establish the facts and circumstances of the insured's death. Much of the record is in the form of plaintiff's own admissions. These facts and circumstances demonstrate that the insured was fatally efficacious in adopting a means to an end and there is absolutely no evidence that he did not understand what he was doing. When such is the case, and there is no evidence to the contrary, a court is justified in finding that the insured comprehended the physical consequences of his act. *Streeter* v. *Insurance Society,* 65 Mich. 199 (1887); *Sabin* v. *National Union,* 90 Mich. 177 (1892); *Johnson* v. *Metropolitan Life Ins. Co.,* 404 F.2d 1202 (C.A.3, 1968). In order to survive defendant's motion, plaintiff must counter defendant's showing with proof to the contrary. This has not been done. The mere allegation in a pleading or brief that a factual dispute exists does not, ipse dixit, compel such a finding. The only item arguably amounting to "evidence" that the insured did not understand the physical consequences of his act is the following answer to an interrogatory:

> "said expert will testify that said Alexander P. Dukay did not understand the physical consequences of the act whereby he killed himself and that because of the mental state of said deceased, said actions by him were involuntary and further were not done by a person while in the normal possession of his mental faculties, and that said deceased was suffering from a disassociative reaction or was in a dis-

> associative reactive state at the time of his decease, and that the grounds for said opinion were a narrative statement prepared for said psychiatrist by plaintiff's attorney and submitted to said expert, said psychiatrist's personal consultations with Alexander T. Dukay, a surviving son of deceased Alexander P. Dukay, copies of the police reports involved, copies of the autopsy reports, and perhaps other information not known to plaintiff."

The foregoing is in fact nothing more than an assertion that proof to the contrary will be forthcoming at trial. Such is clearly not an adequate showing and does not comport with that which is contemplated and required under Rule 56. Moreover, the proffered but unproduced evidence is much the same as that considered in *Johnson,* where the court stated:

> "Thus, the appellant has admitted that her only basis of judgment concerning the mental state of the insured when he killed himself is the opinion of one psychiatrist who never observed the insured." 404 F.2d at 1204.

The clear implication in *Johnson* was that such proof, even if produced, was of little probative value, especially in light of the circumstances of the insured's death.

In summary, the Court is not of the opinion that its previous holding is erroneous. Therefore, IT IS ORDERED that plaintiff's Motion is, in all respects, denied.

/s/ FRED W. KAESS
Chief United States
District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY, a Michigan corporation,
Plaintiff,
-vs-
MASSACHUSETTS MUTUAL LIFE INSURANCE CO., a Massachusetts corporation,
Defendant.

CIVIL ACTION NO. 4-70650

ORDER DENYING PLAINTIFF'S "MOTION TO ALTER AND AMEND JUDGMENT, ETC."

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 11 day of November, 1974;

Present: THE HONORABLE FRED W. KAESS
Chief United States District Judge

For the reasons stated by this Court in its Opinion and Order of November 6, 1974, in Civil Action No. 74-70649, IT IS ORDERED that Plaintiff's "Motion to Alter and Amend Judgment, Etc." is denied.

/s/ FRED W. KAESS
Chief United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY, a Michigan corporation,
Plaintiff,
-vs-
PROVIDENT LIFE AND ACCIDENT INSURANCE CO.,
Defendant.

CIVIL ACTION NO. 4-70651

ORDER DENYING PLAINTIFF'S "MOTION TO ALTER AND AMEND JUDGMENT, ETC."

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 11 day of November, 1974;

Present: THE HONORABLE FRED W. KAESS
Chief United States District Judge

For the reasons stated by this Court in its Opinion and Order of November 6, 1974, in Civil Action No. 74-70649, IT IS ORDERED that Plaintiff's "Motion to Alter and Amend Judgment, Etc." is denied.

/s/ FRED W. KAESS
Chief United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANN ARBOR TRUST COMPANY, a Michigan corporation,
Plaintiff,
-vs-
PROFESSIONAL LIFE & CASUALTY COMPANY, a foreign corporation,
Defendant.

CIVIL ACTION NO. 74-70660

ORDER DENYING PLAINTIFF'S "MOTION TO ALTER AND AMEND JUDGMENT, ETC."

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 11 day of November, 1974;

Present: THE HONORABLE FRED W. KAESS
Chief United States District Judge

For the reasons stated by this Court in its Opinion and Order of November 6, 1974, in Civil Action No. 74-70649, IT IS ORDERED that Plaintiff's "Motion to Alter and Amend Judgment, Etc." is denied.

/s/ FRED W. KAESS
Chief United States
District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1500

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND PROFESSIONAL LIFE AND CASUALTY COMPANY,

Petitioners,

vs.

ANN ARBOR TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1500

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND PROFESSIONAL LIFE AND CASUALTY COMPANY,

Petitioners,

vs.

ANN ARBOR TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARGUMENT

The Decision Below Is Supported By Federal Law.

Petitioners contend the Court of Appeals abused its discretion when it affirmed the District Court judgments but remanded the case to the District Court with instructions to re-open if the Michigan Supreme Court decides the identical issue of state law in companion cases already pending in the State courts contrary to the opinion of the Court of Appeals. Respondent contends that the Court of Appeals could have abstained from making a decision on the summary judgments under the circumstances and the procedure followed by the Court of Appeals being something less than actual abstention is therefore not an abuse of discretion and is also within its auxiliary appellate powers.

Respondent asserts the reasoning of the majority, concurring, and dissenting opinions in *Louisiana Power & Light Co.* v *City of Thibodaux*, 360 U.S. 25 (1959) is controlling of the issue here.

In *Thibodaux*, the District Judge, in a diversity case, stayed further proceedings at pre-trial until the Supreme Court of Louisiana interpreted the meaning of a specific statute granting authority to a city to expropriate private property. This abstention required the municipality to commence a separate action for declaratory judgment in the state trial courts.

The majority opinion in *Thibodaux* states:

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law. Thus in *Railroad Comm'n* v *Pullman Co.*, 312 U.S. 496, 499, it was said: 'Had we or they (the lower court judges) no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.' "

This Court in *Thibodaux* also pointed out the distinction between it and *Meredith* v *City of Winter Haven*, 320 U.S. 228, (footnote 2, page 27) stating that in *Winter Haven* the issue was whether or not a District Court was compelled to surrender federal jurisdiction to a state court, whereas in *Thibodaux*, as in the case at bar, the question is whether or not a federal court is jurisdictionally disabled from seeking the "controlling light" of the State Supreme Court where interpretation of state law is required. In *Thibodaux* this Court also established that abstention can occur in cases other than equity[1] and based its action and reasoning on a deeper policy of

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[1]See also *Clay* v *Sun Insurance Co.*, 363 U.S. 207, 80 S.Ct. 1222, 4 L. Ed. 2d 1170 (1960), a later case, where abstention was sustained in a common law action seeking money damages not dealing with state eminent domain law. The dissent in *Thibodaux* finds the existence of an eminent domain action was not decisive of the majority opinion (page 37) which analysis appears sound.

comity derived from the very nature of Federalism itself (page 28) in holding that abstention by a Federal Court is a wise and productive discharge of that Court's judicial duty where the Court also seeks to ascertain the meaning of a disputed state statute from the only tribunal in power to speak definitively — the courts of the state passing the law (page 29). This Court concluded:

> "Caught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana, the District Judge determined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana for a prompt ascertainment of meaning through the only tribunal whose interpretation could be controlling — the Supreme Court of Louisiana. The District Court was thus exercising a fair and well-considered judicial discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana." (page 30)

The dissent in *Thibodaux* contended abstention can only be sanctioned to avoid deciding a federal question or when a question of comity exists, also citing *Railroad Comm'n.* v *Pullman Co., supra,* in support. The dissent also pointed out that in *Thibodaux* there was not the slightest hazard of friction with a state (page 34) because the state, by

its constituent organ, the City of Thibodaux, itself urged the District Court to adjudicate the state law issue (page 35), and the added expense and attendant delay caused by abstention would work affirmatively to the benefit of the party seeking abstention because it would have possession and use of the property during the period of delay (page 43).

Respondent contends that not only do the facts in the case at bar meet the requirements of the *Thibodaux* majority opinion for granting abstention but also meet the requirements of the dissenting opinion for granting abstention.

Respondent, as plaintiff in the District Court, asserted that under Michigan Supreme Court decisions a suicide provision excluding coverage if death results from "suicide, sane or insane" does not *ipso facto* preclude recovery because the test for determining coverage under such phraseology is not dependent on the doing of a physical act but requires the probing of the actual state of mind of the deceased to determine his ability to form an intent at the time of his self-imposed death. Respondent further asserted that this proposition of law in Michigan was set forth in five Michigan Supreme Court cases which are cited in the opinion of the Circuit Court of Appeals.[2] (Petition, Appendix A, p.2a)

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[2]The opinion of the Court of Appeals also refers to the annotation at 9 A.L.R. 3d 1015 (1966) showing the general unsettled state of the issue. *Christensen* v *New England Mutual Life Ins. Co.*, 197 Ga 807, 30 SE 2d 471 (1944) referred to at page 1025 thereof is a thorough and well-reasoned support of Respondent's position.

Respondent's contention that the applicable Michigan law is found in these cases, was accepted by Petitioners in the District Court and Court of Appeals and by those Courts also. However, what seemed to Respondent as clear law was described by the Court of Appeals as being generally unsettled. The Court of Appeals also expressed its uncertainty as to the interpretation the Supreme Court of Michigan would place upon its five earlier decisions.

The District Court also expressed its doubts, stating:

> "More importantly, none of the cases has directly decided if the insured's failure to comprehend the physical consequences of his act will allow recovery under an insurance policy containing a 'suicide, sane or insane' clause. Dicta in two cases militates in favor of recovery under such circumstances, *Streeter* v *Insurance Society*, 65 Mich. 199 (1887); *Sabin* v *National Union*, 90 Mich. 177 (1892). Dicta in another case, however, indicates that recovery would not be allowed, *Blackstone* v *Insurance Co.*, 74 Mich. 592 (1889). In *Streeter*, the court said that if one does an act in a state of unconsciousness, or involuntarily, whether he is sane or insane, such act is nothing more or less than accidental, and will not operate to forfeit the policy. In that case, however, the court said there was no evidence that the act was involuntary, or that the insured was unconscious when he inflicted upon himself the fatal wound." (Petition, Appendix D, page 10a)

In spite of this, however, and contrary to Respondent's position that the cited cases were not dicta but were decided on plaintiff's failure to prove the requisite lack of intent, the District Court granted the motions for summary judgment when discovery answers and depositions showed that plaintiff's expert psychiatric witness would testify that the deceased killed himself while in a state of dissociative reaction while unable to comprehend the physicial consequences of his act and the city police detective in charge of the investigation testified on Petitioners' deposition that the police could find no motive for the killings and the cause of the killings was Dr. Dukay's mental condition.

In conclusion the District Court stated:

> "It is, therefore, the Court's feeling that the better rule is that which holds that the insurer need not prove that the insured had the capacity to comprehend the physical nature or consequence of his act in order to avoid liability."[3] (Petition, Appendix D, p. 12a)

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[3]It would appear that the District Court erred re burden of proof. Under an accident type policy plaintiff must prove the absence of all policy conditions negating coverage and in an ordinary life policy plaintiff has the duty of going forward with the proofs after defendant shows a self-inflicted death. The policies here involved are of both types.

Thus, the District Judge, assuming the cases were dicta, failed to follow the Michigan law regarding the binding effect of dictum (in re *Cox Estate*, 383 Mich. 108, 117 (1970)) and substituted a personal feeling for existing admitted dicta contrary to the position of this Court expressed in *Hawks* v *Hamill*, 288 U.S. 52, 60.

Against this background the Court of Appeals, after recognizing the law as being unsettled and after expressing its concern as to the interpretation the Michigan Supreme Court would put on its own existing prior decisions, affirmed the summary judgments rather than staying proceedings but instructed the District Court to reopen the cases in the event the Supreme Court of Michigan rendered decision contrary to the conclusion of the Court of Appeals affirming the District Court as to the meaning of the existing Michigan cases.

Thus the Court of Appeals did not abstain[4] but granted Petitioners their final judgment. The Court also exercised its discretion to protect Respondent's

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[4]The Sixth Circuit has adhered to a strict policy regarding abstention. However, under its tests in addition to the matter of comity it appears here that, as admitted by the Court of Appeals, only the Michigan Supreme Court can authoritatively construe the opinions, state regulation of insurance is involved (*Gay* v *Board of Registration Commissioners*, 466 F.2d 879 (1972)), First Amendment rights are not involved (*Garvin* v *Rosenau*, 455 F.2d 233 (1972)) and the problem is not one of lack of state interpretation (*Keidan* v *Universal C.I.T. Credit Corporation*, 327 F.2d 616 (1964)), *Krakoff* v *United States*, 431 F.2d 847 (1970)).

beneficiaries from being in a position where they could prevail in the Michigan courts and lose in the Federal courts on the identical issue of Michigan law, the ultimate determination of which it is agreed rests with the Michigan Supreme Court, by requiring the District Court to reopen the cases only if the Michigan Supreme Court decided the issue of state law contrary to Petitioners' position.

Even if we assume the Court of Appeals did abstain here, abstention is justified because the matter of comity is strongly present. Not only is the insurance business affected with a strong public interest in Michigan (*Attorney General* v *Michigan Surety Co.*, 364 Mich. 299, 325 (1961)) and not only have the District Court and Court of Appeals found the controlling Michigan law to be unclear, but that law is not a statute yet to be interpreted by the Michigan Supreme Court (as in *Thibodaux, supra*) but is the very opinions of the highest court in Michigan which itself will be called upon to interpret its *own language* in presently pending cases (contrary to *Thibodaux, supra)* and in so doing will be saying what it meant.

It would appear under such circumstances that not only would a "hazard of friction" exist if the Court of Appeals irretrievably (as to Respondent) told the Michigan Supreme Court what it meant but the decision of the Court of Appeals maintains that sense of balance and respect essential to the efficient intermeshing of the federal and state systems and

furthers the efficient administration of justice for the benefit of parties who are citizens of each sovereignty.

The District Court described the issue of law here as "novel" (Petitioners' Petition, Appendix D, p.11a). In *Kaiser Steel Corporation* v *W. S. Ranch Company*, 391 U.S. 593 this Court, in a *per curiam* opinion, ordered the Tenth Circuit Court of Appeals to abstain from decision in a case where the meaning of the words "public use" in the New Mexico constitution were controlling. This Court stated:

> "*The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts* and since a declaratory judgment action *is actually pending there*, in all likelihood that resolution will be forthcoming soon. *Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all* other businesses and land owners concerned with the use of this vital resource . . . Federal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination." (page 594, emphasis added)

The similarities to the case at bar are striking. Here the issue has also been described as novel, actions governed by the same issue are pending in the state court, and interpretation of ultimately

controlling language is involved. In *Kaiser* as in *Morgan* v *Equitable Life Assurance Society*, infra, a consistent rule of law was held to be pre-dominant and a justification for abstention itself. In the case at bar the Court of Appeals has accomplished this end without the necessity for abstention.

The Decision Below Is In Accordance With The Court's Appellate Powers And Is Not An Abuse of Discretion.

Respondent asserts Petitioners' cases are not persuasive. *Southern Pacific Railroad Company* v *United States*, 168 U.S.1 (1897) is an estoppel case and is out of context here; *Landis* v *North American Co.*, 299 U.S. 248 (1936) does not deal either with abstention or comity; in *McClellan* v *Carland*, 217 U.S. 268 (1910) the state law was clear, no significant matter of comity existed and this Court did not render judgment but only remanded to the Court of Appeals to have the District Court explain its actions in abstaining; and *Meredith* v *Winter Haven, supra* has already been distinguished by this Court in *Thibodaux, supra*. In the cases cited by Petitioners neither a plaintiff or a defendant was faced with the prospect of both prevailing and losing on the identical issue of state law, an exceptional circumstance.

Even in the absence of any question of comity, proper administration justifies the action of the Court of Appeals. In a suit seeking recovery under an insurance policy similarly requiring interpretation of state insurance law the Circuit Court of Appeals

for the Tenth Circuit voluntarily abstained pending state court decision stating:

> "Sound judicial administration requires that such person, and the other parties in interest receive the same treatment in each court." *Morgan* v *Equitable Life Assurance Society of the U.S.*, 446 F.2d 929, 932 (C.A. 10, 1971).

The Court of Appeals' writ of mandate is also in accordance with the express provisions of 28 U.S.C. Sec. 1651 allowing writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

As noted in Petitioner's petition, there are five companion cases presently pending in the state courts. After the order of the District Court granting Petitioners' motions for summary judgment, identical motions on the same issue of law were made in the state trial court seeking summary judgments. All of said policies contain the same phrase, "suicide, sane or insane," and the issue as to the interpretation of the existing Michigan cases is presently squarely before the Michigan courts.

It is obvious that some time will pass[5] before the issue of law is finally decided by the Michigan Supreme Court, however, this delay is only

[5]Any delay involved can only be charged to overcrowded dockets and not to Respondent. In the following cases delays of from six to eight years occurred because of stays: *Spector Motor Service, Inc.* v *O'Connor*, 340 U.S. 602 (1951), (seven years); *England* v *Louisiana State Board of Medical Examiners*, 384 U.S. 885 (1966), (six years); *U.S.* v *Leiter Minerals, Inc.*, 381 U.S.413 (1965) (dismissed as moot eight years after abstention ordered).

burdensome to Respondent. Petitioners have received their judgments and assuming the Michigan Supreme Court confirms the case interpretations by the District Court and Court of Appeals no further effort or expense by them is necessary. In the meantime they can continue to use the language in their policies which they have so far contended protects them against liability for all self-inflicted deaths in Michigan. Thus the fear expressed in the dissent in *Thibodaux, supra* that any delay will inure to the benefit of the party receiving a stay is not present here; obviously Respondent prefers to have the issue of law settled in the state courts as soon as possible and have trial in both systems as soon as possible particularly because interest does not run on a claim in the federal courts until rendition of judgment.

Further, Petitioners have the opportunity under Michigan law to appear in any appellate proceeding as *amicus curiae* and submit briefs in support of their position. In the unusual event that this matter does not reach the Supreme Court of Michigan, Petitioners still are not compelled to do anything; they have their judgments.

CONCLUSION

It is clear that the function of courts is to do justice to the citizens utilizing the courts. This basic proposition was recognized by the Court of Appeals and it protected Respondent's beneficiaries against the monstrous possibility of winning in the state

court and losing in the federal court on the same issue of Michigan law without any effective remedy therefor, and it did so without any unreasonable prejudice, if any at all, to Petitioners.

This action by the Court of Appeals is justified and is not an abuse of discretion either under the doctrine of abstention or under their appellate powers. In neither event can the result here achieved by men of good will be charged as a "substantial departure from the accepted and usual course of judicial proceedings or an impedient to the efficient administration of justice"; in fact the result is the opposite.

In conclusion and in the words of Mr. Justice Stewart from his concurring opinion in *Thibodaux, supra*, Respondent asserts that the Circuit Court of Appeals "in a conscientious effort to do justice" protected Respondent without harming Petitioners. "Under the circumstances presented, I think the course pursued was clearly within the . . . (Court of Appeals) allowable discretion."

WHEREFORE Respondent prays said Petition for Writ of Certiorari be denied with costs to Respondent.

Respectfully Submitted,

By: /s/ William D. Barense
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